No. 83-787

Office - Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1983

HOWARD GINSBURG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether petitioner was deprived of a fair trial by the District Court's consideration of "other bad acts" evidence admitted in violation of due process principles embodied in the Federal Rules of Evidence [esp. Rule 404(b)], including:

   A. Three mail fraud convictions in 1958 and 1962; and

   B. Deposition excerpts and documents from civil proceedings brought by the Wisconsin State Attorney General in 1976 with respect to a franchising operation during 1966 to 1972.

2. Whether the Court of Appeals improperly has limited to jury trials the constitutionally-rooted protections codified in the Federal Rules of Evidence with respect to the use of "other bad acts" evidence, by refusing to consider the possibility that in a bench trial, the trial judge could be affected by prejudicial evidence.

3. Whether the District Court's consideration—both as to guilt and sentencing—of the Wisconsin deposition evidence referred to in Question 1, deprived petitioner of due process of law, where unproven assertions of wrongdoing were implied in the questions posed to petitioner ("negative pregnant" questions), and petitioner's denials were never refuted.

4. Where the District Court apparently considered erroneous information in making the sentencing decision, and the Court of Appeals agreed that petitioner's interpretation of the lower court's remarks was "arguable,"*

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* Order, App. A, p. 17.

whether the appeals court's determination to assume a different interpretation is irrational, resulting in violation of petitioner's right to due process with respect to sentencing.

Parties Involved (per Rule 21.1(b))

Petitioner, Howard Ginsburg, was indicted and tried with Lawrence Bender and Curtis Norton; all three defendants were convicted. Petitioner was appellant in the Court of Appeals; his case was decided together with the consolidated appeals of Bender and Norton (see App. A). Respondent, United States of America, was plaintiff in the District Court and appellee in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Howard Ginsburg (hereafter, defendant) respectfully prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit, to review its decision affirming his convictions and sentence for mail fraud.

Judgment and Order Below

The Order of the Court of Appeals for the Seventh Circuit, No. 81-3035, unpublished per 7th Circuit Rule 35, is set out as Appendix A, per Rule 21.1(k)(i) of this Court.

Jurisdictional Statement

On September 7, 1983, the Court of Appeals for the Seventh Circuit filed its Order herein (App. A). Defendant's timely Petition for Rehearing was denied on October 5, 1983. (App. B) This petition to review the judgment of a federal court of appeals in a criminal case is timely filed within 60 days after denial of Petition for Rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rules 20.1 & 20.4 of this Court.

Constitutional Provision, Statute and Rules Involved

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

The statute for violations of which petitioner was convicted is 18 U.S. Code 1341, defining and penalizing mail fraud. No questions are raised in the Petition as to interpretation or application of this section. The text is set out in App. D, pursuant to Rule 21.1(f).

Federal Rules of Evidence 401, 402, 403, 404(b) and 609 are set out in App. D.

STATEMENT OF THE CASE

Nature of the Case

Defendant was indicted with six others in a 29-count indictment charging use of the mails in a scheme to defraud in violation of 18 U.S.C. 1341. After the government dismissed the case against four of the defendants, defendant stood trial with Curtis Norton and Lawrence Bender.

At their joint bench trial, defendant was found guilty of 20 counts and sentenced to 5 years on counts 1, 3, 4, 5 & 6, concurrent; 5 years on counts 8, 10, 12, 13, 14 & 15, concurrent, but consecutive to the 5 years imposed on counts 1 and 3 to 6; for a total of 10 years. The court also imposed a period of 5 years probation on counts 18-20, 22, 24-26 & 29 consecutive to the term of imprisonment, with the condition that he make restitution in the amount of $500,000.[1]

Defendant's motions to exclude certain prior, 20 to 25 year old convictions of his, (Tr. 5), and to exclude his deposition taken at a Wisconsin civil proceeding in 1976 respecting activities in 1966 through 1972, (Tr. 2321), were denied.

The Court of Appeals for the Seventh Circuit affirmed (App. A) and denied defendant's timely Petition for Rehearing. (App. B)

Jurisdiction of the Trial Court (Per Rule 21.1(i))

The basis for federal jurisdiction in the court of first instance is 18 U.S.C. 3231, providing that "The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States."

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[1] Norton, found guilty on 3 counts, was sentenced to 5 years probation with the first 6 months on Work Release, and ordered to make $15,000 restitution. Bender, found guilty on 5 counts, was sentenced to 5 years probation, the first 12 months on Work Release, and ordered to make $20,000 restitution.

STATEMENT OF FACTS

Preface

Despite the Court of Appeals' characterization of the evidence against defendant as "staggering," (App. A, p. 10), the evidence presented a genuine issue as to the essential element of defendant's intent.[2] Although defendant does not contend in this Petition that the evidence is constitutionally insufficient, the gist of the Points presented herein is that the trial court improperly considered prejudicial information in reaching its guilt and sentencing decisions.

In order realistically to assess the potential prejudicial impact upon the fact-finder and sentence-imposer of the complained-of "prior bad acts" evidence, it becomes necessary, therefore, to consider the evidence as a whole. Accordingly, a Synopsis of Facts is set out as App. C. (See also App. A, pp. 2-12 for the reviewing court's summation of the evidence respecting Ginsburg.)

Facts re Use of "Other Bad Acts" Evidence

Against defendant Ginsburg alone, the trial court considered: (A) the Philadelphia evidence—three convictions for mail fraud dating from 1958 and 1962—some 20 to 25 years prior to trial. (G. ex. M-4, M-5 & M-6; Tr. 2313-22); and (B) the Wisconsin (or Savoy) evidence—deposition excerpts and documents concerning a so-called "similar scheme" in Wisconsin with respect to a franchise opera-

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[2] While resolving the insufficiency-of-the-evidence issue against defendant, the Seventh Circuit noted that "there is evidence to support a conclusion that Ginsburg hoped that BIC could succeed as a legitimate business," (App. A, p. 12), and that "some of the statements used to sell distributorships could be excused as mere 'puffing'. . . " *Ibid.*

tion during 1966 to 1972, the subject of civil (but never criminal) proceedings brought in 1976 by the State Attorney General. (G. ex. Savoy 1-5; Tr. 2313-22)

The Philadelphia convictions were for offenses in 1955-56 (G. ex. M-4 & M-5) and 1958-62 (G. ex. M-6). The government's proof thereof consisted of introduction of the indictments to which defendant had pleaded guilty, (Tr. 2322), despite defendant's argument that his role in these offenses could not sufficiently be ascertained or clarified from mere introduction of the indictment so as to warrant use of the prior offenses as "similar" to the charge on trial.

The Wisconsin (Savoy) evidence demonstrates no wrongdoing admitted or established as to Ginsburg; rather, the only implication of wrongdoing was in the questions put to defendant by the Wisconsin Attorney General during the Wisconsin deposition proceedings. (G. ex. Savoy 1, throughout.) Perusal of the Wisconsin evidence reveals that the Wisconsin Attorney General repeatedly asked questions insinuating wrongdoing by defendant, which defendant denied (under oath). There was no rebuttal, impeachment, or follow-up contradicting defendant's sworn denials.

Neither the District Court (see Tr. 2313-22) nor the Seventh Circuit (see App. A, pp. 15-17, esp. p. 16) considered the possibility that the trial court could have been prejudicially affected by any of this evidence. (See also Tr. 2275, where the prosecutor states—and the District Court does not disclaim—"Since it is a bench trial . . . there is no prejudice.") The Court of Appeals expressly stated, with respect to the prior convictions, that there was "no error in the district court's consideration of the prior convictions for this limited purpose [*i.e.*, to show

knowledge and absence of mistake], especially since the danger of jury confusion and prejudice were not present." (App. A, p. 16)

In sentencing defendant, the trial court stated:

> "Four felony convictions for a fraud scheme—almost unheard of. Even though the last conviction was some time ago, while it is true that you have not been convicted within the last 19 years or so, it is also not true that you have not engaged in criminal acts in that interim. I have heard about them." (Tr. of Dec. 11, 1981, p. 19.)

Confronted with defendant's interpretation of these remarks—that this referred to the Wisconsin activities—and the government's contrary interpretation—that they referred simply to the [allegedly] criminal acts that occurred during operation of BIC—, the Court of Appeals stated:

> "While either interpretation is arguable, we do not believe that the court was mistaken about the nature of the Wisconsin proceedings." (App. A, p. 17)

Additional details, where needed, are set out in the course of the Points which follow.

REASONS FOR GRANTING THE WRIT

The treatment of defendant's arguments concerning denial of a fair trial and sentencing hearing due to the trial court's consideration of "other bad acts" evidence, both by the trial court and the Court of Appeals, demonstrates an alarming trend involving the indiscriminate use of such evidence by federal prosecutors unfettered by the judiciary. The constitutionally-rooted fair trial concepts which form the basis of the relevant codifications in the Federal Rules of Evidence (fully set out in App. D) seriously have been violated in this case; certiorari should be allowed so that this Court may enforce the Constitution through proper application of the Rules.

Prefatory Statement (Applicable to All Following Points)

The due process roots of the formulation that "other bad acts" evidence may be admitted only if its probative value outweighs the danger of unfair prejudice (F.R.E. 403, construed together with F.R.E. 404(b)), are clear. See, *e.g.*, *Boyd* v. *United States*, 142 U.S. 450, 458, 35 L.Ed. 1077, 1080 (1892) (reversing), relied upon in *United States* v. *Magee*, 261 F.2d 609, 612 (7 Cir. 1958) (reversing); *Michelson* v. *United States*, 335 U.S. 469, 475-76, 93 L.Ed. 168, 173-74 (1948); see 1 WIGMORE, EVIDENCE § 57 (3d ed. 1940). Since the Rules codified existing law, both pre- and post-Rule decisions relating to the "balancing test" are essentially the same. See, *e.g.*, *United States* v. *Beechum*, 555 F.2d 487, 509 (5 Cir. 1977) (reversing); *United States* v. *Cox*, 536 F.2d 65, 69 n.10 (5 Cir. 1976) (reversing); 2 WEINSTEIN & BERGER, EVIDENCE 404[08] (1975) (F.R.E. 404(b) codifies prior federal law *re* evidence of uncharged bad acts).

In *Beechum, supra,* the court stated:

> "We do not believe that the new rules of evidence wrote a new set of commandments on a wholly new slate. As a codification founded on its historical antecedents, the Federal Rules of Evidence shall not be taken to repeal the products of our studied deliberation unless that intention is clearly manifest." 555 F.2d at 509.

In evaluating the following Argument, the constitutional underpinnings of the applicable Rules of Evidence demand that the possible impact of their violation upon the fairness of defendant's trial be deemed of paramount importance:

> " '[T]he problem is not a simple evidentiary one, but rather goes to the fundamental fairness of the trial itself.' *United States* v. *Gilliland*, 586 F.2d 1384, 1390 (10 Cir. 1978), quoting from *United States* v. *Burkhart*, 458 F.2d 201, 204-05 (10 Cir. 1972) (both reversing).

1.

Petitioner was deprived of a fair trial by the District Court's consideration of "other bad acts" evidence admitted in violation of due process principles embodied in the Federal Rules of Evidence [esp. Rule 404(b)], including three mail fraud convictions in 1958 and 1962, and deposition excerpts and documents from civil proceedings brought by the Wisconsin Attorney General in 1976 with respect to a franchising operation during 1966 through 1972.

2.

The Court of Appeals improperly has limited to jury trials the constitutionally-rooted protections codified in the Federal Rules of Evidence with respect to the use of "other bad acts" evidence, by refusing to consider the possibility that in a bench trial, the trial judge could be affected by prejudicial evidence.

[Points 1 and 2 are so related—Point 2 is actually a single facet of the more-inclusive Point 1—that both are presented together herein.]

The evidence complained of should not have been admitted. Its probative value was so minimal—both because of temporal remoteness and for lack of sufficient similarity with the case on trial—and the danger of prejudice was so great, that defendant's right to due process was violated by the District Court's consideration of this evidence.

The government's method of establishing the prior acts rendered admission of the evidence erroneous, even if, in the abstract, it is arguable that such evidence could have been admissible.

And finally, despite possible relevancy (which we dispute), the evidence was improperly admitted because the court failed specifically to determine—as required by F.R.E. 403—whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. (See Tr. 2258-2303; 2320-22; 2530-33.) The District Court considered only whether there was probative value, giving no moment whatsoever to the possibility that he, the judge, was human, with human tendencies, such that it was possible that he might be affected by this evidence; that it was conceivable he might improperly attribute to this evidence more weight than was rational upon the facts. The mandatory balancing test was not applied either by the District Court (Tr. 2313-22) or the Seventh Circuit (App. A, p. 17)

Remoteness and Lack of Proof of Similarity

"Other bad acts" evidence which is too remote in time lacks probative value, as does evidence which is not sufficiently similar to the charge on trial to be relevant to any of the issues properly adducible therefrom. See *United States* v. *Cox*, 536 F.2d 56 (5 Cir. 1976) (reversing in a cogent decision discussing these essential factors).

Here, the distance in time of the evidence of prior convictions (20 to 25 years prior) and the Wisconsin evidence (10 to 15 years), is too remote to permit a finding of probative value (relevancy). See, *e.g.*, *United States* v. *Cathey*, 591 F.2d 268 (5 Cir. 1979) (admission of 16-year old conviction, absent "exceptional circumstances," reversible error); *United States* v. *Brahm*, 664 F.2d 414 (4 Cir. 1981); *United States* v. *Figueroa*, 618 F.2d 934, 942 (2 Cir. 1980). See generally McCormick, Handbook of the Law of Evidence 439 n.30 (2d ed., Cleary 1972).

Likewise, there was insufficient proof of similarity between the prior acts and the case on trial, a factor necessary for a finding of relevance to intent or knowledge. For "other bad acts" evidence to be admissible on these issues, the prior acts must be sufficiently similar to the charge on trial to permit the conclusion of intent or knowledge to be drawn. See, *e.g.*, *United States* v. *Kasouris*, 474 F.2d 689, 692-93 (5 Cir. 1973); *United States* v. *Klein*, 515 F.2d 751, 755-57 (3 Cir. 1975); *United States* v. *McFadyen-Snider*, 552 F.2d 1178, 1182-84 (6 Cir. 1977).

Lack of Proper Foundation for Admission of Evidence

The government's methods of attempting to establish the "other bad acts" were insufficient to lay a proper foundation for their admission.

First, the proof must be by "clear and convincing" evidence: "[U]nless the prior crime evidence is clear and convincing its probative value simply cannot justify its potential for prejudice." *United States* v. *Dolliole*, 597 F.2d 102, 107 (7 Cir. 1979); *accord*, *United States* v. *McPartlin*, 595 F.2d 1321, 1344-45 (7 Cir. 1979). Here, because the "other acts" are not rationally demonstrated by competent, admissible evidence, the proof does not meet the requisite standard.

With respect to the Philadelphia (prior conviction) evidence, defendant's supposed role in the prior offenses was not sufficiently clarified, from mere introduction of the indictments to which he had pleaded guilty, to warrant the use of the prior convictions as "similar" to the charge on trial, on the issue of intent. (Tr. 2322; see App. A, p. 16.) An indictment on its face, as such, has no probative value on the knowledge-intent issue. *United States* v. ***Klein***, *supra*, at 755-76 (holding that witness testimony, rather than the bare indictment, is necessary to establish similarity); *cf. United States* v. *Payne*, 474 F.2d 603 (9 Cir. 1973).

Similarly, the Wisconsin evidence did not provide a rational basis from which defendant's prior wrongdoing or knowledge thereof could properly be deduced. At bar, the prosecution wrongly convinced the trial court that defendant's deposition in the Wisconsin civil proceedings demonstrated his knowledge of wrongdoing, (Tr. 2321-22),* while at most, it demonstrated merely defendant's awareness that a Wisconsin Asst. Attorney General inferentially disapproved of Savoy's business practices. When all that can be said of evidence offered to prove prior wrongdoing is that wrongdoing may be inferred, such evidence is inadmissible, on balance, under the Rule 403 test. See, *e.g.*, *United States* v. *Cook*, 557 F.2d 1149, 1152-53 (5 Cir. 1977). Other cases reversing for improper admission of evidence merely implying or giving rise to suspicion of wrongdoing include: *United States* v. *Greenfield*, 554 F.2d 179, 186 (5 Cir. 1977) (weak inferential chain implying wrongdoing); *United States* v. *Jones*, 570 F.2d 765 (8 Cir. 1978) (no evidence of wrongdoing in the writing of uncharged Class II prescriptions by defendant doctor); *United States* v. *Vargas*, 583 F.2d 380, 386 n.5 (7 Cir. 1978) ("vague and speculative"); *United States* v. *Pinter*, 630 F.2d 1270, 1285-86

* See App. A, pp. 16-17.

(8 Cir. 1980) ("other crimes" evidence based on suspicion and implications not "clear and convincing").

Here, the Wisconsin evidence is faulty under the above standards because there is no rational basis from which the conclusion of wrongdoing may be reached from the documentary evidence in those civil proceedings, while the Philadelphia evidence suffers from the fatal infirmity that defendant's actual role in those ancient offenses is not sufficiently ascertainable from the indictments alone to render the convictions legally "relevant."

Judges Are Not Super-Human

> "'[A]n obvious truth is that once prior convictions are introduced the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality.'" *United States* v. *Gilliland*, 586 F.2d 1384, 1389 (10 Cir. 1978), quoting from *United States* v. *Burkhart*, 458 F.2d 201, 204 (10 Cir. 1972) (both, reversing).
>
> "A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." *United States* v. *Myers*, 550 F.2d 1036, 1044 (5 Cir. 1977).

Clearly, such principles apply to all trials, not only to jury trials. Just as the trial court's failure to apply the balancing test required a reversal in *United States* v. *Figueroa*, 618 F.2d 934, 942 (2 Cir. 1980), so should the District Court's refusal so to do at bar; for here, the court merely *presumed* it would not be prejudicially affected by the "other bad acts" evidence. (See Tr. 2313-22.) When the prosecutor stated, in argument, "Since it is a bench trial, . . . there is no prejudice," (Tr. 2275), the court did not disclaim this misstatement of the law, proceeding to admit the disputed evidence merely upon a conclusion of "rele-

vance." The Seventh Circuit's position, likewise, denies even the possibility of prejudice in a bench trial. (App. A, p. 16.)

Admitting "other bad acts" evidence without weighing the possibility of prejudice in the Rule 403 balance violates the fair trial principles upon which the Rule is based: " '[T]he problem [respecting "other bad acts" evidence] is not a simple evidentiary one, but rather goes to the fundamental fairness of the trial itself.' " *Gilliland*, quoting from *Burkhart*, both *supra*.

Applying the balancing test only to jury trials improperly presumes that judges are not subject to human frailties. Of course this is not true, as a host of cases recognize; for example:

> "The disciplined judicial mind should not be subjected to any unnecessary strain; even the most austere intellect has a subconscious." *United States* v. *Walker*, 473 F.2d 136, 138 (D.C. Cir. 1972).
>
> "[T]here are . . . limits to the immunity to improper and prejudicial insinuations which judges are presumed to possess." *People* v. *Nuccio*, 48 Ill.2d 375, 253 N.E.2d 353, 364 (1969) (bench murder conviction, reversed due to prejudicial evidence considered by court).

See also *United States* v. *Turnipseed*, 272 F.2d 106, 107-08 (7 Cir. 1959) (reversing where "the trial judge erred in his recollection" as to evidence), recognizing that judges are not infallible.

The groundless speculation both of the District Court and the Court of Appeals, disclaiming even the possibility of prejudice in a bench trial, smacks of the tongue-in-cheek irony reflected in the following language:

> " 'We all know that just being a lawyer doesn't make a man a magician or give him supernatural powers. Only an appointment to the federal judiciary can do

> that.' " *United States* v. *DeLaTorre*, 605 F.2d 154, 156 n.1 (1 Cir. 1979), quoting DeWitt Hale, (then) Chairman, Judiciary Committee, Texas House of Representatives.

Because the constitutionally-based, mandatory balancing test was not applied in this case, certiorari should be allowed.

Policy Considerations

Application of the "balancing test" prescribed by F.R.E. 403 must not be limited to jury trials. The same Rules must be applied both to bench and jury trials, lest defendants opt for jury trials in all cases in order to secure the benefits of the Rules. While the right to trial by jury is a right of the defendant and can be waived, see F.R.Cr.P. 23, in fact some ⅓ of all federal criminal trials are tried by the court rather than by jury. 2 WRIGHT, FEDERAL PRACTICE & PROCEDURE: CRIMINAL 2d § 372 at 297, fn. 4. Per Prof. Wright, these figures are remarkably stable; 32% in 1980, and 33%, 15 years earlier. See 1980 Ann. Rep. of the Director of the Administrative Office of the United States Courts, p. 282. The time and expense saved by bench rather than jury trials is thus considerable; and a decision as at bar—which erodes important constitutionally-based evidentiary rules designed to preserve fair trials—necessarily discourages defendants from waiving jury trial. And although Rule 23 provides that jury waiver must be with the consent of the government and the court, several decisions granting defendant's motions to waive jury despite the government's objection pinpoint the types of cases wherein material savings of a bench trial are of maximum benefit to the public: that is, cases involving great complexity, voluminous documentary exhibits, and intricate laws and regulations (*e.g.*, medicaid and Internal

Revenue Code).[3] Indeed, the case at bar is just such a case—imagine the additional time and expense to the government, had any of the three defendants decided to exercise his right to jury trial. The sheer voluminousness of the exhibits in this case would render it an unwieldy jury trial. (It was a five week bench trial. See App. 9.)

While judges may not be as emotional as the lay persons who serve on juries, they are humans with human emotions and human responses. Even in a bench trial, where the government seeks to introduce evidence of "other bad acts," the potential for prejudice *must* be weighed in the mandatory balance. The District Court's posture—merely assuming he would not be affected by the disputed evidence—and the Court of Appeals' attitude that since it is a bench trial, the danger of prejudice is absent—fly in the face of the clear mandate of the constitutionally-rooted Rules.

Because limiting application of Rule 403's balancing test to jury trials will discourage defendants from waiving jury trials—where some ⅓ of all federal trials are currently disposed of as non-jury trials—the issue raised herein is of compelling importance to the operation of the judicial system.

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[3] In *United States* v. *Braunstein*, 474 F.Supp. 1, 12-18 (D.N.J. 1979), the court granted defendant's motion for trial by court despite government's lack of consent, where case concerned medicaid laws and Internal Revenue Code and regulations and involved general knowledge of bookkeeping, accounting, state budget and federal reimbursement mechanisms and economic and financial workings of medicaid. Similarly, in *United States* v. *Panteleakis*, 422 F.Supp. 247 (D.R.I. 1976), the court accorded defendant a bench trial under a 21-count indictment alleging medicare fraud, despite the government's refusal to consent to jury waiver, where surrounding circumstances, including complexity of case, rendered government's refusal unreasonable and arbitrary.

The possible prejudicial effect of "other bad acts" evidence upon the finder of fact must be weighed in the balance prescribed by Rule 403, even where the finder of fact is a judge, not a jury. The Seventh Circuit's improper approach in this case emasculates Rule 403 where bench trials are involved, thus improperly limiting the Rule's protection to jury trials, contrary to the intent of the drafters, and infringing on the right to a fair trial. For this additional reason, certiorari should be allowed.

3.

Petitioner was deprived of due process of law by the District Court's consideration—both as to guilt and sentencing—of the Wisconsin deposition evidence referred to in Question 1, where unproven assertions of wrongdoing were implied in the questions posed to petitioner ("negative pregnant" questions), and petitioner's denials were never refuted.

Both with respect to defendant's guilt (Tr. 2321-22) and with respect to sentencing, (Tr. of Dec. 11, 1981, p. 19),[4] the District Court specifically considered that the Wisconsin (civil deposition) evidence (see pp. 4-6, *supra*), demonstrated defendant's involvement in wrongdoing. However, the only implication of wrongdoing was injected by the Wisconsin Asst. Attorney General who put questions to Ginsburg during the Wisconsin deposition proceedings. (G. Ex. Savoy 1, throughout; see p. 5, *supra*.)

Although Ginsburg, in the Wisconsin proceedings, denied each and every accusation of wrongdoing, the questioner never attempted affirmatively to demonstrate that

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[4] See Point 4, *infra*, for a discussion demonstrating that the Wisconsin evidence specifically was considered on the question of sentence.

these denials were false, that is, that the negative pregnants contained in the improper questions were true. With respect to defendant's conviction, it already has been demonstrated, (see pp. 10-12, *supra*), that such unestablished innuendoes are insufficient to lay a foundation for admission of "other bad acts" evidence.

The prejudice in the implication of the questions fatally infects both defendant's conviction and his sentence.

Reversing a conviction for murder in *Stewart* v. *United States*, 366 U.S. 1, 7, 6 L.Ed.2d 84, 89 (1961), this Court opined:

> "Indeed, the recognition that such an inference [*i.e.*, that the insinuation contained in the question is true] will be drawn from leading questions of this kind lies at the root of the long established rule that such questions may not properly be put unless the inference, if drawn, would be factually true."

In *Jones* v. *United States*, 338 F.2d 553 (D.C. Cir. 1964), defendant's conviction was reversed because the prosecutor's questions (on direct and redirect examination of its own witness) contained improper inferences which were never proven, although the witness' answers to the improper questions—as here—denied the factual assertions borne in the questions. And in *Richardson* v. *United States*, 150 F.2d 58, 64 (6 Cir. 1945), the reviewing court reversed even though the improper questions—which contained unjustified and unproven accusations—were withdrawn and never answered. Clearly, it is in the implication of the question itself that the prejudice lies. Other reversals based on such improper insinuations include: *United States* v. *Perlstein*, 120 F.2d 276 (3 Cir. 1941); *Lee Won Sing* v. *United States*, 215 F.2d 681 (D.C. Cir. 1954); and

cf. United States v. *Bohle*, 445 F.2d 54 (7 Cir. 1971); see also *King* v. *United States*, 372 F.2d 383, 394 (D.C. Cir. 1967). In *People* v. *Nuccio*, 43 Ill.2d 375, 253 N.E.2d 353 (1969), the Illinois Supreme Court reversed defendant's bench trial conviction for murder, finding that defendant had been prejudiced by the trial judge's exposure to and consideration of the improperly "loaded" questions. The trial court's overruling of defense objections to the unfair innuendoes implicit in the improper questions demonstrated that the court had considered such innuendoes. Reversing, the reviewing court noted, "[T]here are limits to the immunity to improper and prejudicial insinuations which judges are presumed to possess." 253 N.E.2d at 364.

Here, defendant was prejudiced when the trial court considered the never-proven insinuations contained in the improper questions put by the Wisconsin Attorney General, both with respect to guilt (Tr. 2321-22) and sentencing. (Tr. of Dec. 11, 1981, p. 19)

The Seventh Circuit's decision fails even to acknowledge that this issue was raised on appeal. (See App. A, entirety.)

Because such highly improper evidence was considered against defendant, his conviction and sentence are lacking in fundamental fairness. The Court of Appeals' avoidance of this issue violates the promise to all defendants of meaningful appellate review. To permit this Court to speak to the despicable prosecutorial practice here revealed, and to take the necessary steps to discourage the derivative use of such unfair "negative pregnant" questions,[5] certiorari should be allowed.

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[5] Though here, the unfair questions were posed in State proceedings, the federal prosecutor's use thereof to defendant's detriment constitutes federal prosecutorial misconduct which this Court can and should control.

4.

Where the District Court apparently considered erroneous information in making the sentencing decision, and the Court of Appeals agreed that petitioner's interpretation of the lower court's remarks was "arguable," the appeals court's determination to assume a different interpretation is irrational, resulting in violation of petitioner's right to due process of law with respect to sentencing.

In sentencing defendant, the District Judge stated:

> "Four felony convictions for a fraud scheme—almost unheard of. Even though the last conviction was some time ago, while it is true that you have not been convicted within the last 19 years or so, it is also not true that you have not engaged in criminal acts in that interim. I have heard about them." (Tr. of Dec. 11, 1981, p. 19)

In ruling that defendant's due process rights were not violated by this apparent consideration at the sentencing hearing of defendant's alleged participation in improper activities in Wisconsin during 1966-72, the Court of Appeals determined that the lower court had not considered this evidence improperly, although agreeing that defendant's interpretation of the Judge's remarks was "arguable":

> "At sentencing the district court . . . said. 'Even though the last conviction was some time ago, while it is true that you have not been convicted within the last 19 years or so, it is also not true that you have not engaged in criminal acts in that interim. I have heard about them.' Ginsburg insists that this must refer to the Advance franchising operation [the Wisconsin evidence], while the government opines that it simply refers to the criminal acts that occurred during the BIC operations. While *either interpretation is arguable*, we do not believe that the court was mistaken about the nature of the Wisconsin proceedings." (App. A, p. 17; Emphasis added.)

Though defendant had argued extensively that insinuations of wrongdoing improperly were imposed upon the Wisconsin evidence, the Seventh Circuit failed to rule on that issue. (See p. 18, *supra.*) There is no logical basis for the conclusion that the District Court did not consider the Wisconsin evidence improperly with regard to sentencing.

Although the Wisconsin proceedings facially and officially were civil—and we do not argue that the lower court mistakenly believed they were anything other than civil proceedings—it is the inferences and innuendoes drawn from this evidence by the Wisconsin Attorney General which, we maintain, the District Judge used to formulate his mis-conception that, in connection with the Wisconsin proceedings, defendant "engaged in criminal acts". The Wisconsin proceedings did not have to be misconceived as criminal for the judge to draw such inference, considering the "negative pregnant" contents of the evidence. (See Point 3, *supra.*)

In *United States* v. *Harris*, 558 F.2d 366 (7 Cir. 1977), the appeals court vacated defendant's sentence and remanded for a new sentencing hearing, where the trial court apparently had relied on prejudicial hearsay, the accuracy of which was contested for the first time on appeal. (Here, of course, Ginsburg denied the implication of the "negative pregnant" questions during the deposition proceedings; see p. 5, *supra.*) The *Harris* Court expressly held that a showing of explicit reliance on improper factors or erronoeus information is not prerequisite to a successful attack of a sentence on due process grounds. *Id.* at 375. Instead, the Court adopted the following standard: If it is "not improbable" that the District Judge was "influenced by improper factors in imposing sentence," *ibid.*, the sentence must be vacated and the cause remanded

for resentencing. In the case at bar, of course, the Seventh Circuit has agreed that defendant's interpretation of the sentencing judge's remarks is "arguable". (App. A, p. 17) Accordingly, the above standard has been violated by the instant decision, wherein the Court of Appeals merely speculates and assumes that the sentencing judge necessarily was referring to the acts giving rise to the charges on trial, rather than to acts insinuated by the Wisconsin evidence.

Indeed, such speculation and conjecture, not based on evidence, violates the due process rule that inferences must rationally be connected to the facts from which they are inferred. See, *e.g., Leary* v. *United States,* 395 U.S. 6, 23 L.Ed.2d 57 (1969).

In adopting the "not improbable" test in *Harris, supra,* the Seventh Circuit followed a Second Circuit decision, *McGee* v. *United States,* 462 F.2d 243, 247 (2 Cir. 1972). See *Harris, supra,* 558 F.2d at 375. The instant decision thus conflicts not only with the Seventh Circuit's own *Harris* decision, but also with a decision from a sister Circuit. This conflict amongst the Circuits suggests the propriety of a grant of certiorari on this serious due process problem respecting sentencing.

In *Townsend* v. *Burke,* 334 U.S. 736, 741, 92 L.Ed. 1690, 1693 (1948), this Court held that due process is violated when a defendant is sentenced "on the basis of assumptions concerning his criminal record which were materially untrue." Both *Townsend, supra,* and *United States* v. *Tucker,* 404 U.S. 443, 30 L.Ed.2d 592 (1972), have been read broadly to preclude reliance upon "improper or inaccurate information" in making the sentencing determination. *Dorszynski* v. *United States,* 418 U.S. 424, 431 n.7, 41 L.Ed.2d 855, 862 n.7 (1974); *accord, Harris, supra,* 558 F.2d at 373. "[D]efendant retains the right not to be

sentenced on the basis of invalid premises." *United States* v. *Espinoza*, 481 F.2d 553, 555 (5 Cir. 1973); *accord*, *McGee* v. *United States*, *supra*.

Since the trial court's reliance on "criminal acts in that interim" of which "I have heard . . ." could have referred to the Wisconsin evidence rather than to the acts charged for which defendant was on trial, and the evidence concerning the Wisconsin activities was replete with improper insinuations of wrongdoing in the "negative pregnant" questions put to Ginsburg in the deposition proceedings, it is "not improbable" that the sentencing court utilized "improper or inaccurate information" in making the sentencing decision. This violates due process.

To discourage reviewing courts from making unfounded assumptions concerning the internal workings of the judicial brain,[6] and to insure the continued viability of the salutary principles of such decisions as *Tucker* and *Townsend*, *supra*, certiorari should be allowed.

CONCLUSION

To correct the serious trial, sentencing and appellate errors in this case which go to the very heart of the fairness of defendant's trial and sentencing, certiorari should be allowed for the reasons stated above. And, on the merits, defendant's convictions should be reversed, or, in the alternative, remanded for resentencing.

Respectfully submitted,

JULIUS LUCIUS ECHELES

Attorney for Petitioner

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[6] See quotation from *United States* v. *De La Torre*, *supra*, pp. 13-14, concerning the supernatural powers of the federal judiciary. Such powers are necessary, we submit, to reach the conclusion the Seventh Circuit has on this issue.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued February 23, 1983)

September 7, 1983.

Before
Hon. Richard D. Cudahy, Circuit Judge
Hon. Jesse E. Eschbach, Circuit Judge
Hon. William P. Grey, Senior District Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

LAWRENCE BENDER, *Defendant-Appellant.*

No. 81-3033

v.

No. 81-3035
HOWARD N. GINSBURG, *Defendant-Appellant,*

v.

No. 81-3036
CURTIS NORTON, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 80 CR 128

CHARLES P. KOCORAS, *Judge.*

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* The Honorable William P. Gray, Senior District Judge of the United States District Court for the Central District of California, sitting by designation.

ORDER

Howard Ginsburg, Lawrence Bender and Curtis Norton appeal from federal mail fraud convictions under 18 U.S.C. § 1341. Ginsburg was convicted of twenty counts, Bender of five counts and Norton of three counts, all stemming from their involvement with Barrett Industries Corporation, a company which promoted and sold film processing distributorships. For the reasons below, we affirm.

I.

According to the evidence viewed most favorably toward the government, Barrett Industries Corporation ("BIC") was the brainchild of Howard Ginsburg. Started in 1974, BIC's business consisted primarily of selling distributorships to persons in various areas of the country, who in turn would market a combined package of Kodak film and Barrett prepaid processing. Curtis Norton and Lawrence Bender were salesmen and successive BIC sales managers.

The first contact BIC made with a prospective distributor was through a classified ad which solicited area representatives to service company established accounts. *Eg.* Exh. Dahlem 1. The ad assured "no selling" and advised that applicants must be bondable because "cash flow will exceed $250,000 per year." On calling the toll free number provided in the ad, the prospective distributor was sent an information package, including a glossy blue brochure. Exh. BIC 6. In that brochure, the prospect was greeted by a letter from the president, Marcus Harvey, who boasted that the BIC principals had "over 100 years of experience in marketing, management, and distribution." In explaining the BIC distribution program, the brochure assured the prospect that once accepted as a distributor, he would be guided by "tested procedures and

systems . . . .'"[1] BIC provided a list of what it supplied each distributor, including established locations, full company training, secured investment, national advertising, no selling or soliciting, competitive prices and continuous home-office assistance. The Brochure then stated, "RESULT: DISTRIBUTOR MAKES MONEY". The Brochure then described a "Phase II" whereby BIC would market photographic equipment at "greatly reduced prices" through the distributor. The distributor need not sell the equipment, since the users of BIC processing would be informed of equipment sales through flyers enclosed with their returned photos. The brochure told prospects that BIC would "provide expertise and the vehicle to insure drastic profits for our distributors." Corporate references were provided.

The next step for the prospect was to meet a BIC representative. Over the course of two or three meetings, the BIC representative told the prospective distributor that as a conservative estimate, he could expect to sell three rolls of film per day, six days a week, at each location, based on past performances. Tr. at 190, 498, 663, 825, 835, 1175, 1280, 1376-77, 1464, 1535, 1691, 2114, 2159. A document labeled "Potential Profit Income" projected annual profits of $5,616 for every ten locations. Exh. BIC 7. The representative would typically tell the prospect that an experienced marketing team would come into the area and set up locations for him in high volume stores, often mentioning well-known drug and grocery chains. TR. at 218, 504, 607, 663, 1137, 1172, 1283, 1377, 1685, 2116, 2158. The representative often explained that BIC would buy out existing inventories of film in the stores in which BIC

[1] Because the evidence shows only one female distributor, we use masculine pronouns in general references to prospects and distributors.

stands were to be set up. TR. at 221, 664, 1174, 1284, 2115. The representative usually told the prospect that if he was in any way dissatisfied, he could sell back the distributorship at the end of a year and get his money back. TR. at 245, 249, 664, 1058, 1379-80, 1692. The prospect almost invariably asked whether the prospect would be the only distributor in the area, and the representative conveyed either explicitly or by implication that the area would be exclusive. TR. at 215, 245, 454, 500, 602, 735, 835, 875, 1007, 1055, 1174, 1287, 1381, 1532, 1605-06, 1687, 2227. The representative would sometimes describe BIC's large processing facilities, TR. at 872, 939, 1464, explain the Phase II equipment sales program, TR. at 663, 1182-83, 1530, 2117, and assure the prospect that BIC was growing and doing well, TR. at 825-26, 2117, 2225. Prospects who checked BIC's corporate references and Dun & Bradstreet reports found them to be good. TR. at 1139, 1461, 1612, 2147, 2155. The representative would convey the impression that there was competition for the area distributorship. TR. at 206, 1467, 1533, 1621. After being approved by "Chicago," the prospect would pay BIC approximately $4,000 to $4,500 per ten locations and await with high hopes the realization of the representative's promises. The fledgling distributor was greeted with a warm "welcome aboard" letter from president Marcus Harvey, acknowledging receipt of full payment for the distributorship. *E.g.* Exh. Balmas 9.

The distributor's dreams of a successful distributorship rapidly began to sour when a "locator" showed up to set up locations for his film racks. The promised "marketing team" consisted of only one person, and the touted marketing survey consisted of perusing the yellow pages under independent grocers. TR. at 287, 513, 668-69, 878. The locator often simply told the distributor to forget what the

salesman had said about locations, TR. at 1194, 1295-97, that the profit margin BIC gave was too small to get into larger locations, *e.g.* TR. at 276, or that he would have to start small and work his way up to larger stores, *e.g.* TR. at 1141. The distributor would accompany the locator on his rounds to secure locations, but the locator would not allow the distributor to come into the stores with him. The locations were nearly universally disappointing, described as low volume, "mom and pop" groceries, "menial," "hole-in-the-walls"; some were hardware, gift or toy stores, and one was a pornographic newsstand. TR. at 270-74, 479, 607, 1142, 2131, 2169. The locations had no existing film inventory for BIC to buy out. The locator did not set up the displays, but left that to the distributor, who often discovered that the store owner had changed his mind before the distributor could install the rack. The distributor was then left to his own devices to secure his full complement of locations. The promised "full company training" consisted mainly of instructions on filling out forms. The distributor learned, much to his surprise, that he should purchase more supplies of film and flash cubes at once, since the supply that came with his distributorship would be insufficient to replenish the stands. *E.g.* TR. at 884-85, 1198. The film racks were small and made of wire, not like the ones shown in the BIC materials. TR. at 307, 894.

Most distributors attempted to make a go of their distributorship. However, sales fell far short of the projected three rolls per location per day, some locations showing no sales for weeks. TR. at 463, 675, 843, 1142, 1177, 2179. Often, store owners asked that the racks be removed because they were not sufficiently profitable. The "Phase II" equipment sales program never materialized. Distributors were shocked to find other distributors in their

areas. TR. at 558, 761, 1018-19, 1064, 1199, 1308-09, 1388-89, 1491, 1563, 1623-24, 1710. When distributors called or wrote to BIC with their complaints, they received only empty assurances and broken promises, if their calls and letters were answered at all. TR. at 264, 424, 466, 555, 681, 955, 1396, 1628, 2138, 2237-38. Distributors were told that BIC does not assign exclusive territories, TR. at 1310, 1393, 1495, and on checking the terms of the contract, they discovered that, contrary to the salesman's representations, the contract only guaranteed that BIC *itself* would not *directly* compete with its distributors, *e.g.* Exh. Balmas 1. When a distributor tried to exercise the repurchase guarantee, he found that, contrary to the salesman's representations, BIC would refund only the price of left-over *inventory* minus 5%, which represented only about one tenth the price of the distributorship. *See e.g. id.* Misunderstanding of these two contract provisions was nearly universal. *See* TR. at 356, 360, 413-15, 604, 747, 1186, 1356, 1496. Nearly all distributors lost substantial amounts of money, often their entire investment. *See* TR. at 468, 623, 761, 846, 1045, 1149, 1208, 1342, 1397, 1497, 1567-68, 1722, 2179.

BIC's operations consisted primarily of a small office staff in Chicago, and in the field, two or three locators and half a dozen salesmen. TR. at 109. The president, "Marcus Harvey," was actually the alter ego of Howard Ginsburg, the "vice president." *See* TR. at 98, 130, 164. Before starting BIC, Ginsburg had played a substantial role in a breath spray franchising operation, which had failed. He had three prior mail fraud convictions stemming from franchising operations. BIC had no photo finishing labs of its own, but contracted with LaSalle Photo Services in Chicago for film processing. Nevertheless, all exposed film was sent to BIC, who in turn relayed it to LaSalle, and

the finished photos appeared to have been returned by BIC.

BIC's salesmen were paid on a strict commission basis—$800 for every ten locations. TR. at 1727. Bender and Norton, in supervisory positions, would receive $150 for each ten locations. TR. at 1732. Salesmen were trained in the art of the "negative sell," whereby the salesman made the prospect feel as if he were applying for a job rather than buying a distributorship. TR. at 1737. At sales training sessions, salesmen were told many of the things that they would pass on to prospects, such as, Ginsburg's former breath spray franchising business had been highly successful, TR. at 1735, 1767, locations would be in high volume stores, TR. at 1748, locators would buy out existing film inventories, TR. at 1748, the income projections were conservative and based on surveys taken by Kodak, TR. at 1750, and that if the prospect could not make things work, he could send back his inventory and get his money back, TR. at 1753. Salesmen were taught, however, to avoid telling prospects of the number of persons they were interviewing in the area or the number of applications they were submitting. TR. at 1762. They were also discouraged from giving prospects references of other distributors. TR. at 1771. Salesmen were supposed to tell prospects after the initial meeting that they must be approved by "Chicago," but the salesmen were told that they were actually not to call anyone in Chicago. TR. at 1754. Salesmen were taught to plant the seeds of an idea in a prospect's mind, and then twenty minutes later it would come out of the prospect's mouth. TR. at 1738. This was desirable because salesmen were "liars," but if it came from a prospect's mouth it was the truth because "they don't know any better." TR. at 1770. Although the sales materials cautioned the salesmen to "Tell the Truth," Exh. Lewis 1, salesmen were taught to evade

or "explode" questions about exclusivity of territories, TR. at 1760-62.

In the BIC offices, distributor complaints about locations and lack of profits were coming in a few times each week, TR. at 161-62, and becoming more frequent with time, TR. at 95. BIC fell into arrears with LaSalle Photo Labs, and LaSalle quit processing BIC film in about June 1978. TR. at 2430. BIC then went out of business. Many distributors were notified only indirectly of BIC's demise, when customers complained that their film was being returned unprocessed. Notes enclosed with the undeveloped film cited increased postage, labor and material costs as forcing BIC to "close its doors." *E.g.* Exh. Balmas 8. Distributors that were favored with direct notifications from BIC received a similar story, with the additional explanation that if BIC had been permitted to raise the price of its film 50 cents per roll, BIC could have survived, but that the several distributors that were approached with this proposal vehemently rejected it. *E.g.* Exh. Hernley 4. There was no evidence that any distributor was ever consulted about raising the price of film. Examination of BIC's financial record and checks indicated that substantial amounts of BIC monies were paid to Ginsburg and his wife for personal expenses.

BIC provided Dun & Bradstreet with financial information, on a form signed by Ginsburg and dated October 20, 1977, showing BIC with a net worth of $193,000. Exh. Dun & Bradstreet 1. However, the BIC corporate income tax return for the year ending September 30, 1977, also signed by Ginsburg, showed a negative net worth. Exh. BIC 3. In a form submitted to the Better Business Bureau of Chicago, purportedly signed by Marcus Harvey, BIC claimed to have a 31,000 square foot factory and one hundred factory workers. Exh. BBB 1.

A twenty-nine count mail fraud indictment was returned against Ginsburg, Bender, Norton and several BIC salesmen and locators on February 20, 1980. Charges against the salesmen and locators were dismissed, as were several of the mail fraud counts. The defendants waived a jury trial, and after a five week bench trial, the district court announced its findings. The court found Ginsburg guilty of all twenty counts in which he was named. Ginsburg was sentenced on each of the first five counts to a five year term in custody, to run concurrently; on each of the next six counts to a five year term in custody, to run concurrently with each other but consecutively to the first five years in custody; and on the remaining nine counts to five years probation with the condition that he make restitution in the amount of $500,000. The court found Bender guilty of five of the counts in which he was named but was unconvinced on a sixth count. Bender was sentenced to a total of one year in a work release program, five years probation, and restitution of $20,000. The court found Norton guilty of three of the counts in which he was named and not guilty of two. Norton was sentenced to six months in a work release program, five years probation and restitution of $15,000. Ginsburg, Bender and Norton appeal.

II

Each of the appellants challenge the sufficiency of the evidence supporting his convictions. Ginsburg and Bender also claim that the indictment should have been dismissed because of prosecutorial misconduct before the grand jury. Ginsburg claims that evidence of past mail fraud convictions and other "bad acts" should not have been admitted into evidence. Bender contends that statements of his alleged co-schemers should not have been admitted into evidence against him.

III

A. *Sufficiency of the Evidence*

18 U.S.C. § 1341 prohibits one who has devised or intended to devise "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . ." from using the mails for the purpose of executing the scheme. The elements of a mail fraud offense are: (1) the formation of a scheme with intent to defraud, and (2) use of the mails in furtherance of the scheme. *United States* v. *Shavin*, 287 F.2d 647, 649-50 (7th Cir. 1961). The gravamen of the offense is the scheme to defraud, hence it is unnecessary for the government to prove that any victim was actually defrauded or suffered a loss, *United States* v. *George*, 477 F.2d 508, 512 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973), or that the defendant actually obtained money or property, *United States* v. *Shavin*, *supra*, 287 F.2d at 651-52. Fraudulent representations may be effected by deceitful statements of half truths or the concealment of material facts. *Williams* v. *United States*, 368 F.2d 972, 975 (10th Cir. 1966), *cert. denied*, 386 U.S. 997 (1967). A defendant's belief that his plan will succeed will not justify baseless, false, or reckless representations or promises. *Sparrow* v. *United States*, 402 F.2d 826, 828 (10th Cir. 1968).

The evidence in support of Ginsburg's convictions is more than sufficient; it is staggering. All the evidence points to the conclusion that Ginsburg was the architect and mastermind of the BIC operation, that he dictated or at the very least approved the contents of his salesmen's pitch, and that he was aware that there were vast discrepancies between what the salesmen promised distributors and what BIC ultimately delivered. From BIC's initial contact with a prospect by a classified ad, through the

sales presentations, to the handling of complaints by disillusioned distributors, it is difficult to find *any* statement coming from BIC that is entirely candid and truthful. The scheme to defraud element of a mail fraud violation is not defined by some technical standard, but rather a standard reflecting moral uprightness, fundamental honesty, fair play, and right dealing with members of society. *United States* v. *Van Dyke*, 605 F.2d 220, 225 (6th Cir.), *cert. denied*, 444 U.S. 994 (1979). It is painfully clear that Ginsburg's BIC Operations fell far short of this standard. While the BIC plan was not fraudulent on its face, all that is necessary is that the scheme involved some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension. See *id.* The BIC operations that Ginsburg directed were craftily designed to mislead and deceive even persons of above average prudence and comprehension, as evidenced by the ambiguously worded contract which was misinterpreted to prospects by BIC salesmen and by the feeding of false information to Dun & Bradstreet and the Better Business Bureau of Chicago.

Ginsburg's principal defense is that BIC was a legitimate business that unfortunately failed, that he cannot be held accountable for misrepresentations that his salesmen made, and that he himself is guilty, at worst, of "puffing." We find that Ginsburg is accountable for misrepresentations made by his salesmen because the evidence shows that Ginsburg himself told the salesmen at least some of the falsehoods they passed on to prospects and was responsible for the preparation of the misleading sales materials the salesmen used. In addition, it is clear that at least from 1976, distributors were calling and writing Ginsburg or "Harvey" with complaints about misrepresentations by salesmen, yet Ginsburg did nothing to change the sales pitch.

Ginsburg would have us believe that the business was legitimate, and that many distributors were successful and made money. Yet the evidence shows only two distributors that were arguably successful, TR. at 3095-3138, 3152-3178, and it appears that one of these could turn a profit only because Ginsburg consented to a special discount on the film. TR. at 3158. Ginsburg also points to the evidence showing that in some cases he honored the inventory buy-back provisions and in other cases he approved a full refund for disgruntled distributors. TR. 2907, 2928, 2944-45, 3014, 3025, 3033, 3068, 3113, 3187-88. We are unimpressed with Ginsburg's honoring of the ambiguous buy-back provision of the BIC contract and with the fact that he chose not to defraud *everyone* that had the misfortune of becoming involved with BIC.

Although there is evidence to support a conclusion that Ginsburg hoped that BIC could succeed as a legitimate business, even such good intentions would not excuse the misrepresentations BIC propagated from its inception. *See United States* v. *Uhrig*, 443 F.2d 239, 241 (7th Cir.), *cert. denied*, 404 U.S. 832 (1970); *Sparrow* v. *United States*, *supra*, 402 F.2d at 828. While some of the statements used to sell distributorships could be excused as mere "puffing," the representations as to profitability projections being based on past performance, exclusively of territories, and the quality of the locations, to name a few, were clearly misrepresentations of material facts. And although not essential to a mail fraud conviction, it is also clear that many distributors relied on these misrepresentations to their substantial detriment.

The evidence against Norton and Bender is not as overwhelming as the evidence against Ginsburg; therefore, we have taken particular care in reviewing the record to assure ourselves that there is sufficient evidence against

each of these defendants supporting each count on which they were convicted. Their managerial positions with BIC and their association with Ginsburg are insufficient to support a mail fraud conviction. And while it is clear that many of the statements they made to prospects were false, we must determine that the defendants knew that the statements were false and that they possessed the requisite intent to defraud. *See United States* v. *Pearlstein*, 576 F.2d 531, 537 (3rd Cir. 1978).

Norton's convictions stem from his sale of three overlapping distributorships in Pennsylvania in early 1976. Aside from any other misrepresentations Norton may have made, each of the three distributors testified that Norton had either explicitly stated or unmistakably implied that the territory would be exclusive. TR. at 1381, 1480, 1606, 1621. Each distributor was shocked and disappointed to find other competing BIC stands in his area. TR. at 1388, 1491, 1623-24. Norton must have known that his representations that the territories would be exclusive were false, since he sold virtually the identical territory to three prospects within a month or two. We gather additional support for the conclusion that Norton knew his representations were false and that he had the requisite intent to defraud from his instruction to salesmen on how to "explode" questions of exclusivity. TR. at 1760-62. The answer Norton fed the salesmen was designed to lead the prospect to believe that his area would be exclusive as long as he built up his distributorship satisfactorily, without ever saying in so many words that the area would be exclusive. In the words of the district court: "Why did you explode the question? Why, if this was not a scheme to defraud, why could not the question be fairly answered?" While Norton may not have know the magnitude of the fraud BIC was inflicting on its victims, we find that there is sufficient evidence to support a finding that Norton

knowingly participated in the scheme to defraud with the requisite intent to defraud.

The evidence also supports a finding that Bender knowingly misrepresented to prospects that the territories they were obtaining would be exclusive. Bender was present at the training session at which Norton taught salesmen to "explode" questions about exclusivity. TR. at 1731. Five distributors testified that Bender represented to them that their territories would be exclusive, TR. at 206, 735, 747, 875, 1055, 1532, yet two later found BIC stands in their areas, TR. 1064, 1563. In a third case, the territory Bender sold overlapped with a territory he himself had sold about a year and a half earlier. TR. 761, 803. On one occasion when a salesman advised Bender that two prospects wanted the same area and that one or both might back out if they knew about each other, Bender advised the salesman to give both the same territory, take their money, and let Ginsburg take care of it from there. TR. at 1778. While Bender expressed hope that an equitable agreement could be reached regarding territories and expressed belief that one or both could receive a refund, *id.*, this incident still lends support to a finding that Bender was not above concealing material facts from prospective distributors. Like Norton, Bender may not have known the extent to which the BIC operations were infested with fraud, but there is sufficient evidence to support a finding that Bender also knowingly participated in the scheme to defraud with the requisite specific intent to defraud.

B. *Use of Co-Schemers' Statements Against Bender*

Conspiracy doctrines apply to a multi-member mail fraud scheme even if the indictment does not formally charge conspiracy. *United States* v. ***Knippenburg,*** 502 F.2d

1056, 1059 (7th Cir. 1974). Our discussion above demonstrates that the government proved by a preponderance of independent evidence that Bender knowingly participated in the scheme to defraud, thus satisfying the requirements of *United States* v. *Santiago*, 582 F.2d 1128 (7th Cir. 1978). The statements of his co-schemers were thus properly admitted against him.

C. *Use of Prior Convictions and "Bad Acts" Against Ginsburg*

Rule 404 of the Federal Rules of Evidence provided:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

As with other evidence, this type of evidence may be excluded if its probative value is substantially outweighed by the danger of confusion or unfair prejudice. *See* Fed. R. Evid. 403.

The district court admitted into evidence, against Ginsburg only, evidence of three prior mail fraud convictions obtained in 1958 and 1962 and evidence relating to a breath spray franchising operation that Ginsburg had been involved with immediately before his involvement with BIC. Ginsburg additionally complains that the evidence of his appropriation of BIC funds for personal use was also improperly admitted as a "bad act" under Rule 404(b), but this evidence went directly to the issue of the fraudulent nature of BIC. Application of Rule 404(b) was unnecessary for its admission.

In the late 1950's and early 1960's, Ginsburg was three times indicted and he three times pleaded guilty to counts of mail fraud stemming from franchising operations. The indictments charged misrepresentations similar to those involved in the instant case. Exh. M-4, 5 and 6. The district court ruled the evidence of these prior convictions admissible to show knowledge that such misrepresentations were improper. TR. at 2321-22. While the convictions were about twenty years old at the time of trial, the last conviction was just a little over ten years old at the time Ginsburg started the BIC operations. Even though the convictions, indictments and underlying franchising operations occurred a considerable time prior to the acts that give rise to the present convictions, we believe that they are sufficiently probative of Ginsburg's knowledge that misrepresentations similar to those charged in the earlier indictments were improper, therefore tending to show knowledge and absence of mistake. We find no error in the district court's consideration of the prior convictions for this limited purpose, especially since the danger of jury confusion and prejudice were not present.

The district court admitted certain evidence relating to a breath spray franchising operation Ginsburg had been involved with from 1966 to 1972. Portions of a deposition taken as part of a civil suit brought by the Attorney General of Wisconsin and certain documents relating to the breath spray operation were admitted on the issue of knowledge and intent. TR. at 2321. The deposition was taken in April 1976, when Ginsburg was operating BIC. In his deposition, Ginsburg admitted being primarily responsible for the preparation of a brochure entitled "What's New at Advance." Exh. Savoy 1 at 18-19. The deposition also shows that the Advance franchising used "locators" similar to those used by BIC, *id.* at 28, and

that Advance wound up "out of business" because of faulty merchandise, *id.* at 55. The "What's New at Advance" brochure bears several striking similarities to the BIC brochure sent to prospective distributors. Exh. Savoy 3. We believe that the evidence regarding the Advance franchising operation was admissible to show that Ginsburg was responsible for the contents of the BIC brochure, that Ginsburg knowingly misrepresented the success of the breath spray operation, and that Ginsburg had notice that certain practices common to Advance and BIC were questionable. We find no error in the admission of the Advance evidence for the purpose of showing Ginsburg's knowledge and intent.

On the issue of prior bad acts, Ginsburg also claims that the district judge mistakenly believed that the Advance evidence established criminal acts, while in fact no criminal activity was proven and no criminal charges brought. At sentencing the district court had first commented on Ginsburg's prior mail fraud convictions, then said, "Even though the last conviction was some time ago, while it is true that you have not been convicted within the last 19 years or so, it is also not true that you have not engaged in criminal acts in that interim. I have heard about them." Ginsburg insists that this must refer to the Advance franchising operation, while the government opines that it simply refers to the criminal acts that occurred during the BIC operations. While either interpretation is arguable, we do not believe that the court was mistaken about the nature of the Wisconsin proceedings. Throughout the course of this lengthy trial, the district court displayed an unerring grasp of the evidence. We decline Ginsburg's invitation to speculate that the court misunderstood and gave improper consideration to the Advance evidence at sentencing.

D. *Prosecutorial Misconduct Before the Grand Jury*

Ginsburg and Bender cite as improper the following statement by the prosecutor to the grand jury regarding the testimony of a former BIC salesman:

> It is our position, after interviewing Mr. Lewis, that he has been very cooperative during the investigation, and he has provided some good information about the conduct of the people who ran the company.
>
> He did make some false statements, as you will see, to various individuals, but he claims that these statements were made because Mr. Ginsburg had convinced him that they were true; and at no time did he ever intentionally make a false statement or misleading statement to any particular person who purchased a Barrett Industries distributorship.

Ginsburg claims that this comment was improper because Lewis did not, during either his grand jury or trial testimony, accuse Ginsburg of lying or convincing him that something was true that was actually false.

This contention is without merit. The prosecutor's statement did not predict that Lewis would accuse Ginsburg of lying, but only that he believed what Ginsburg told him was the truth. This in no way prevented the grand jury from concluding that Ginsburg himself believed what he told Lewis. The evidence that Ginsburg's representations to Lewis and other salesmen were knowingly false came from sources other than Lewis's testimony. The prosecutor also carefully couched his statement regarding Ginsburg's representations to Lewis in terms of what Lewis *claimed*, rather than what was objectively true or what the prosecutor himself believed. We find no error in the prosecutor's comment.

IV

For the reasons above, we affirm the convictions and sentences of Ginsburg, Norton and Bender.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 5, 1983.

Before

Hon. Richard D. Cudahy, Circuit Judge
Hon. Jesse E. Eschbach, Circuit Judge
Hon. William P. Gray, Senior District Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

LAWRENCE BENDER, *Defendant-Appellant.*
No. 81-3033

v.

No. 81-3035
HOWARD N. GINSBURG, *Defendant-Appellant,*

v.

No. 81-3036
CURTIS NORTON, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 80 CR 128

CHARLES P. KOCORAS, *Judge*

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* The Honorable William P. Gray, Senior District Judge of the United States District Court for the Central District of California, sitting by designation.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by defendant-appellant, Bender, and the petition or rehearing filed by defendant-appellant, Ginsburg, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny both petitions. Accordingly,

IT IS ORDERED that the aforesaid petitions for rehearing be, and they are hereby, DENIED.

APPENDIX C

SYNOPSIS OF FACTS

Barrett Industries Corporation [hereafter, BIC] was formed in September, 1974. (G. ex. BIC 1) BIC sold franchises for the marketing of Kodak film together with processing; each distributor (franchise owner) was to supply film to retail locations where it would be sold for a price including processing. The ultimate customer would purchase film together with an envelope addressed to the developer; after taking pictures, the consumer would mail in the film, and it would be processed and the photographs returned in the mail. Hundreds of thousands of rolls of film were processed on behalf of BIC distributors. (Tr. 2888-89; 103-04; see LaSalle Exhibits; see also Tr. 3324.)

The indictment charged, and it was the government's theory that, BIC was merely a sham, not an on-going legitimate business. (See Indictment, R. 1, par. 4) However, of some 370-odd distributors, (see Gins. ex. LaSalle 1), there were only some 20 complaints. (See Tr. 3293, 3314, 3326) Some distributors made money. (Tr. 3137; 3152-66; see also Tr. 485.) The business began in 1974, and the first complaint, according to the government's evidence, was not until February of 1976, (see Tr. 3291), and the first instance of a distributor canceling was in May of 1977. (See Tr. 3292)

A LaSalle (Photo Lab) employee testified for the government to facts substantiating that BIC was an ongoing business, including that LaSalle shipped film and supplies and furnished processing services to BIC distributors. (Tr. 2454-58) From BIC's inception in 1974 until its demise in 1978, some 372 distributors (Tr. 2453, Gins. ex. LaSalle 1) received hundreds of thousands of rolls of film

(Tr. 2888-89) which were processed by LaSalle Photography Co. on BIC's account and with processing fees paid by BIC. (Tr. 103-04)

In January 1978, the price of Kodak film increased (Tr. 2447-48), and in May 1978 there was a substantial increase in postage. (Gins. Grp. ex. P.O. 1) Unable to continue payments for film processing to LaSalle, or to make other arrangements for film processing, (Tr. 2956-90), BIC "went under."

During BIC's active corporate life, the distributorship sales were generally accomplished as follows: A potential distributorship purchaser would read an advertisement in a newspaper; he would phone and give his name and address, and soon would receive information about BIC in the mail, including a brochure (G. ex. BIC 6) and a profit projection. (G. ex. BIC 7) Thereafter a salesman would call and arrange a personal meeting. After several meetings, typically, a contract would be executed; soon thereafter a locator would arrive and arrange for locations in which to place BIC racks for the distributor to service. The Distributorship Agreement included the following language:

> "AREA AND LOCATIONS: COMPANY agrees to procure ..... Retail Account Locations for DISTRIBUTOR AT NO CHARGE within the following AREA ....." G. ex. BIC 12, Gins. ex. 2.

The agreements would be filled out by inserting a number in the first blank, usually in multiples of ten, and by writing in the area within which the locations were to be situated. For example, in the contract signed by the government's first distributor witness, Artie C. Scruggs, the location was filled in, "A 60 mile radius of greater

Marion, Indiana." (Gins. ex. 2) Also in the contract was the language, "COMPANY will not have any direct accounts for film with prepaid processing in the DISTRIBUTOR'S territory." *Ibid.* [The trial court specifically found that this language did *not* promise an exclusive territory as regards other distributors. (Tr. of Oct. 13, 1981, pp. 5-6.)]

Distributorship purchasers were required to sign a form ("Information Survey") which included their negative answers to the questions, "Were you promised *specific* locations?" and "Were you promised *specific* earnings?"[1] Also they were required to sign a "Location Acceptance Agreement" stating, not only that they were satisfied by the locations obtained, but also "that he has received everything in the distributorship agreement."[2]

Despite these statements, some distributors claimed that salesmen had promised them "exclusive territories," (see

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[1] The following listed Ginsburg defense exhibits are, as to each named distributorship purchaser, an "Information Survey", containing the following printed questions, to which each hand-wrote the answer, "No":

"Were you promised specific earnings: No.

Were you promised specific locations? No."

Norton 7 (*re* Fehnel); Thatcher 1; Hildenbrand 1; Peebles 1; Richie 1; Maizlech 56; Hernly 33; Balmas 12; Cunningham 30; White 51. (underlined in original.)

[2] Distributorship purchasers signed a "Location Acceptance Agreement," wherein the locations with the number of rolls of film placed were listed, and, above the purchaser's signature, these printed words appear:

"Distributor accepts the above listed locations and *that he has received everything in his distributor agreement.*"

Ginsburg ex. Norton 3 (*re* Cericola; Lyons 5; Bechtol Grp. ex. 4; Hernley 34; Hildebrand 40(b). (Emphasis added.)

Tr. 215, 245, 249, 500, 510), specific profits or specific locations. (*E.g.*, Tr. 498-99.)

If a distributor complained, BIC normally would honor the "buy-back" provision of the contract, which called only for the repurchase of outstanding inventory at the close of a year in business, (see Tr. 360, 384), and, in unusual cases, defendant Ginsburg (on BIC's behalf) would give back not only a sum reflecting such inventory, but the entire franchise purchase price. (See Tr. 2108, 2130, 2137, 2139.) On behalf of BIC, defendant sometimes refunded more than the contract literally required. (See Gins. Grp. ex. 1, reflecting voluminous refunds; see also Tr. 3018-24, 3298, and Fox ex. 1-9; Moryn ex. 1; Ryan 1, 1A, 2, 2A, 3, 3A, 5, 6, 6A. Refunds and buy-backs are also reflected in the following Ginsburg defense exhibits: Bunner 1-7a; Conway 1-10b; Fallows; Short 1-5.)

Distributorship purchasers who took the trouble to check the references on the BIC brochure received positive information from reputable professionals and banks. (Tr. 2146-48; see Tr. 3302, 3306.) Some were astute business persons; others consulted with financial and legal advisors. (Tr. 1083-84; 872; see Tr. 3306.)

Government witness (former BIC distributorship salesman) Robert Lewis testified without contradiction that defendant expressly had instructed him not to make any misrepresentations to potential distributorship purchasers. (Tr. 1724-1853; see esp. Tr. 1749, 1797-98, 1800-02; *cf.* Tr. 1846.)

* * *

Specific facts germane to the issues raised in the Petition for Certiorari are set out in the Statement of Facts within the body of the petition (pp. 4-6, *supra*) and, as necessary, within the respective Points hereof. See also App. A, pp. App. 2-12.

APPENDIX D

STATUTES AND RULES INVOLVED

18 U.S.C. 1341 provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Federal Rule of Evidence (hereafter, F.R.E.) 401 provides:

"DEFINITION OF 'RELEVANT EVIDENCE' Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

F.R.E. 402:

"RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE GENERALLY INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act

of Congress, by these rules, or by any other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

F.R.E. 403:

"EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (Emphasis added.)

F.R.E. 404(b):

"(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

F.R.E. 609:

"IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he

was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence."